TELETECH CORPORATION SDN. BHD.

v.

SIEMENS ENGINEERING AND SERVICES (PTE) LTD. (DIKENALI SEBAGAI SIEMENS (PTE) LTD.)

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-555-92]
9 FEBRUARY 1993

PRACTICE & PROCEDURE: Application to strike out statement of claim - Principles applicable - Whether plain and obvious case - O. 18 r. 19 Rules of the High Court 1980.

The plaintiff sued the defendant for damages for breach of an agreement made between the plaintiff and the defendant's principal in Germany. It was not disputed that the plaintiff was suing on an agreement to which the defendant was not a party. The defendant applied to strike out the plaintiff's claim before the SAR who allowed the defendant's application and the plaintiff appealed.

Held:

[1] There was no privity of contract between the plaintiff and the defendant and the claim was plainly and obviously unsustainable.

[Appeal dismissed with costs].

Cases referred to:

Dickson Trading (S) Pte. Ltd. v. Transmarco Ltd. [1989] 3 MLJ xci ***(cit)***
Hu Sepang v. Keong On Eng & Ors. [1991] 1 MLJ 440 / [1991] 2 CLJ 999 ***(cit)***
Hashim bin Din v. Sato Kogyo Co. Ltd. [1988] 1 MLJ 527 / [1987] 2 CLJ 438 ***(cit)***

Cases listed at the end of the judgment as "Cases referred to":

Calder & Anor. v. Dobell [1871] LR Vol. VI 486
Cooke v. Wilson & Anor. [1856] 1 CB (NS) 153 65
Halbot v. Lens [1901] 1 Ch. 344
Polhill v. Walter 3 B & AD 115 43
Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor. [1984] 2 MLJ 105 [1984] 2 CLJ 88
D.C. Thomson & Co. Ltd. v. Deakin & Ors. [1952] 1 Ch. 646
Yeng Hing Enterprise Sdn. Bhd. v. Liow Su Fah [1979] 2 MLJ 240
Jamir Hassan v. Kang Min [1992] 2 MLJ 46 [1991] 3 CLJ 2490
Hardial SIngh Sekhon t/a Sekhon Management Services v. MDC Sdn. Bhd. & Anor. [1986] 2 CLJ 244
Lee Ah Chor v. Southern Bank Bhd. [1991] 1 MLJ 428 / [1991] 1 CLJ 66
United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors [1983] 1 MLJ 206 [1982] CLJ 54
Chong Soo Sin (t/a Syarikat Perniagaan Moden) v. Industrial & Commercial Insurance (M) Bhd. [1992] 1 MLJ 636 [1992] 1 CLJ 658
Lin Securities (Pte.) v. Noone & Co. Sdn. bhd. (Klang Jaya Bahru Development Bhd, Third Party [1989] 1 MLJ 321 [1989] 2 CLJ 844

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19, (1)

For the plaintiff - S. Selvanathan; T/n. Thevin, Chandran & Wong
For the defendant - M. Rajasekaran; T/n. Raja, Darryl & Loh

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

The defendant by a summons in chambers filed on 7 July 1992 had applied for the deferment or dispensation of the service of the statement of defence, for the striking out of the plaintiff's statement of claim dated 18 March 1992 pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 (hereinafter "the Rules") and for costs. The learned Senior Assistant Registrar had granted the application on 26 September 1992 and the plaintiff had accordingly appealed against that decision two days later.

Before me, learned Counsel for the plaintiff had submitted that the learned Senior Assistant Registrar had misapplied the Rules as the powers should be exercised only in plain and obvious cases where it can be clearly seen that the claim or answer is on the face of it unsustainable. He had referred me to *Dickson Trading (S) Pte. Ltd. v. Transmarco Ltd.* [1989] 3 MLJ xci where the Assistant Registrar of the Singapore High Court had declared that the power to strike out a statement of claim will not be exercised except with great circumspection and unless it is perfectly clear that the claim cannot succeed, to *Hu Sepang v. Keong On Eng & Ors.* [1991] 1 MLJ 440 where the Kuala Lumpur High Court had pronounced that the power to strike out an action on disclosing no reasonable cause of action is a summary power which should only be exercised in plain and obvious cases and that so long as the statement of claim disclosed some cause of action or raised some questions fit to

be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out, and to *Hashim bin Din v. Sato Kogyo Co. Ltd.* [1988] 1 MLJ 527 where the same trial Judge as in the second case had earlier ruled that it is trite law that the summary power under O. 18 r. 19 to strike out a writ or a statement of claim as disclosing no reasonable cause of action should be exercised only in plain and obvious cases and that as long as the plaintiff can base his action on a cause of action recognisable by the Court, he cannot be shut out from moving the Court to entertain his action notwithstanding that it might not possibly succeed at the end of the day.

As set out by the said learned Counsel, the plaintiff had signed the contract with a company in Germany namely Siemens Aktiengesellschaft (hereinafter "Siemens") on 25 May 1988 whereby the plaintiff had been appointed agent of Siemens for the sale of contractual products in Malaysia for an unlimited period. He went on to state that the defendant as authorised agent of Siemens in South East Asia was aware of the said contract as they had brought it to Kuala Lumpur for signature and that all correspondence was between the plaintiff and the defendant. He further argued that the defendant, without the knowledge of Siemens and without the consent of the plaintiff, had appointed a third party in Malaysia which had caused loss and damage to the plaintiff as only Siemens could make such appointments with the plaintiff's consent. Accordingly, the plaintiff had elected to sue the defendant instead of Siemens as it was the defendant which had caused the purported breach.

Learned Counsel for the plaintiff had also made particular reference to clause 18 of the relevant agreement which reads, under the heading "Assignability":

> Without the prior written consent of Siemens the Agent shall not assign any rights arising from this Agreement to third parties.

As is referred in the other parts of the agreement, the word "Agent" therein refers to the plaintiff and certainly not the defendant, contrary to the submissions of learned Counsel for the plaintiff that the defendant was actually the agent of Siemens. Further, if Siemens had appointed, as alleged by the plaintiff, two agents in this region, surely the best course for the plaintiff was to sue Siemens and not the defendant.

It is not disputed that the plaintiff is suing on the agreement between them and Siemens to which the defendant is not a party and, as pointed out by learned Counsel for the defendant, this fact had been admitted by the deponent of the plaintiff's affidavit affirmed on 27 July 1992. Learned Counsel had further said that the agreement between the plaintiff and Siemens had in fact been terminated in November 1991 which termination had not been challenged. He had also made reference to several discrepancies in the pleadings including two mistakes which learned Counsel for the plaintiff had himself sought to amend at the outset but for which the Court had made no decision until after arguments on this appeal was heard.

We are, however, not bothered with these errors as the relevant party can always apply to amend their pleadings. We are, to my mind, only concerned as to whether there is privity of contract between the plaintiff and the defendant and, on the facts of this case, I find there is none. It is also of no relevance whether the agreement had provided that any dispute or difference of opinion arising out of the agreement shall be referred to arbitration in accordance with the rules of conciliation and arbitration of the International Chambers of Commerce in Paris and that the contractual relations shall be governed be German law. These provisions can only be taken into consideration if there is privity of contract between the parties here and since there is none and consequently since I am clearly of the view that the claim here is plainly and obviously unsustainable, I could only concur with the finding of the learned Senior Assistant Registrar, that the claim should be struck out under O. 18 r. 19(1) of the Rules, and dismiss the appeal with costs.